

(3)

No. 97-1909

In the Supreme Court of the United States

OCTOBER TERM, 1998

MURPHY BROS., INC.

Petitioner,

vs.

MICHETTI PIPE STRINGING, INC.

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

DEBORAH ALLEY SMITH*
RHONDA PITTS CHAMBERS
RIVES & PETERSON
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Counsel for Respondent
Michetti Pipe Stringing, Inc.

PETITION FOR CERTIORARI FILED MAY 26, 1998
CERTIORARI GRANTED NOVEMBER 2, 1998

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APPENDIX A
RELEVANT DOCKET SHEET ENTRIES

Jefferson County Circuit Court, Tenth Judicial Circuit of Alabama

| | |
|----------|--|
| 01/26/96 | Michetti Pipe Stringing Inc. ("Michetti") files suit against Murphy Brothers, Inc. ("Murphy Bros."). |
| 02/12/96 | Summons & complaint served upon Murphy Bros. |
| 03/13/96 | Murphy Bros. files notice of removal to U.S. District Court. |

U.S. District Court for the Northern District of Alabama, Southern Division

| | |
|----------|--|
| 03/15/96 | Notice of removal docketed. |
| 04/03/96 | Michetti files motion to remand case to Circuit Court of Jefferson County. |
| 04/19/96 | District Court denies motion to remand. |

United States Court of Appeals for the 11th Circuit

| | |
|----------|--|
| 12/05/96 | Petition for permission to appeal is granted. |
| 10/24/97 | Court of Appeals reverses and remands case with instruction. |
| 02/23/98 | Court denies Michetti's petition for rehearing and suggestion for rehearing en banc. |

APPENDIX B
**IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA**
FILED: January 26, 1996
Civil Action No. CV9600638
MICHETTI PIPE STRINGING, INC.,
a corporation,
Plaintiff,
vs.
MURPHY BROTHERS, INC.,
a corporation,
Defendant.

COMPLAINT

For its Complaint against Murphy Brothers, Inc. (hereinafter "Murphy"), Michetti Pipe Stringing, Inc. (hereinafter "Michetti") states as follows:

1. Michetti is a corporation organized under the laws of Alberta, Canada, and has its principal place of business in Nisku, Alberta, Canada.
2. Murphy is an Illinois corporation having its principal place of business in East Moline, Illinois.
3. Murphy has been qualified to do business in Alabama since at least 1985 and, on information and belief, Murphy regularly performs work within the State of Alabama. Murphy's registered agent for service of process in Alabama is United States Corporation Company, 57 Adams Avenue, Montgomery, Alabama 36104-4045.
4. Murphy is an Alabama licensed general contractor, license no. 15519.

COUNT I
Breach of Contract

5. Michetti repeats and realleges paragraphs 1 through 4 as if fully set forth herein.
6. On information and belief, Murphy contracted with Florida Gas Transmission Company to construct a natural gas pipeline in Alabama and Florida (the "Project").
7. On or about June 24, 1994, Michetti entered into a subcontract with Murphy to perform the pipe stringing portion of Murphy's contract with the owner, Florida Gas Transmission Company (the "Contract").
8. During the late Summer of 1994, in approximately August and September, the Project experienced significant delays and differing site conditions due to excessive rain and flooding among other things.
9. Michetti made a claim to Murphy to increase its unit price for pipe stringing due to the increased costs it incurred.
10. Murphy and Michetti agreed to settle Michetti's claim in return for a payment from Murphy of approximately \$440,000.
11. Murphy agreed to pay Michetti by increasing the unit rate at which Michetti was to be compensated for pipe stringing on the remaining work.
12. After settling with Michetti by agreeing to pay an increased rate on the remaining work, Murphy began to self-perform work that was within the scope of Michetti's Contract, in effect denying Michetti the opportunity to receive the payment which it had already been promised by Murphy for its claim. Murphy's conduct interfered with and prevented Michetti's performance of the Contract and constitutes a breach.
13. Despite repeated demands, Murphy has persistently failed and refused to pay Michetti the amounts it is owed under the Contract.

WHEREFORE, PREMISES CONSIDERED, Michetti Pipe Stringing, Inc. demands judgment in its favor in the amount of approximately, to wit, \$440,000, together with interest, costs and attorneys' fees and such further legal or equitable relief as this Court deems just and proper.

COUNT II
Fraud

14. Michetti repeats and realleges paragraphs 1 through 13 as if fully set forth herein.

15. Murphy contends that it is relieved of any obligation to pay Michetti by virtue of a purported release, dated July 4, 1995. Even if said release is enforceable, which it is not, the express language of the purported release does not extend to the claims asserted herein by Michetti.

16. Even if the purported release does extend to Michetti's claims herein, which it does not. Michetti was fraudulently induced by Murphy to sign to [sic] purported release through intentional or negligent misrepresentations by Murphy and the suppression of material facts by Murphy; therefore, said release is not enforceable.

17. The purported release was obtained from Michetti only because of Murphy's fraudulent misrepresentation that the release had to be given by Murphy to Florida Gas Transmission Company so that Murphy could obtain from Florida Gas Transmission Company the money with which Murphy would pay all amounts then owing Michetti including the agreed-upon \$440,000 settlement of Michetti's claim.

18. Murphy's representations to Michetti prior to executing the release were false, and Murphy knew those representations were false when made, or innocently made the representations with the intent they be relied upon by Michetti.

19. Michetti reasonably relied upon Murphy's representations in executing the purported release and has been damaged thereby. Murphy's representations to Michetti are violative of Ala. Code §§ 6-5-100, *et seq.*

WHEREFORE, PREMISES CONSIDERED, Michetti Pipe Stringing, Inc. demands judgment in its favor in the amount of approximately, to wit, \$440,000, and such punitive damages as may be awarded by the trier of fact, together with interest, costs and attorneys' fees and such further legal or equitable relief as this Court may deem just and proper.

PLAINTIFF DEMANDS A TRIAL BY JURY.

/s/J. David Pugh
J. David Pugh

/s/James F. Archibald, III
James F. Archibald, III

Attorneys for Michetti Pipe Stringing, Inc.

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
2001 Park Place, Ste. 1400
Birmingham, Alabama 35203
(205) 521-8000

PLEASE SERVE DEFENDANT AS FOLLOWS:

BY CERTIFIED MAIL:

Murphy Bros., Inc.
c/o United States Corporation Company
57 Adams Avenue
Montgomery, Alabama 36104-4045

APPENDIX C
IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

FILED: March 13, 1996

Case No. CV-96-G-0673-S

MICHETTI PIPE STRINGING, INC.,
a corporation,
Plaintiff,

vs.

MURPHY BROTHERS, INC.,
a corporation,
Defendant.

NOTICE OF REMOVAL

COMES NOW, defendant Murphy Bros., Inc. (incorrectly identified in the Complaint as Murphy Brothers, Inc.) and hereby files this notice of removal of the above-described action to the United States District Court for the Northern District of Alabama, from the Circuit Court of Jefferson County, Alabama where the action is now pending. As grounds for this removal, defendant sets forth the following:

1. The above-entitled action was commenced by the Plaintiff in the Circuit Court of Jefferson County, Alabama and is now pending in that court, bearing Civil Action Number CV9600638.
2. Process was served on and initially received by defendant on February 14, 1996.
3. This is a civil action for damages allegedly arising out of breach of contract and fraud.
4. Plaintiff is now and was at the time the said action was commenced a Canadian company with its principal place of

business in Nisku, Alberta, Canada. Defendant is now and was at the time the said action was commenced an Illinois corporation with its principal place of business in East Moline, Illinois.

5. No change of citizenship of parties has occurred since the commencement of the action. Defendant is not a citizen of the state in which the action was brought.

6. The matter in controversy exceeds, exclusive of costs and disbursements, the sum of value of Fifty Thousand Dollars (\$50,000) because the plaintiff is seeking damages in excess of \$440,000.00.

7. Copies of all process, pleadings and orders served upon defendant are filed with this notice.

8. Defendant will give written notice of the filing of this notice of removal as required by 28 U.S.C. §1446(d).

9. A copy of this notice will be filed with the Clerk of the Circuit Court of Jefferson County, Alabama as required by 28 U.S.C. §1446(d).

WHEREFORE, Defendant requests that this action proceed in this Court as an action properly removed to it.

/s/Susan S. Hayes
Thomas A. Carraway
Bar ID No. 417-64-0321

Susan S. Hayes
Bar ID No. 420-84-5527

Attorneys for Murphy Brothers, Inc.

OF COUNSEL:
RIVES & PETERSON
A Professional Corporation
1700 Financial Center
505 North Twentieth Street
Birmingham, AL 35203
(205) 328-8141

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing pleading upon all counsel of record in this cause by placing a copy of same in the United States mail, postage prepaid, addressed as follows on this the 13th day of March, 1996:

J. David Pugh, Esq.
James F. Archibald, III
BRADLEY ARANT ROSE & WHITE
2001 Park Place, Suite 1400
Birmingham, Alabama 35203

/s/Susan S. Hayes
OF COUNSEL

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

CV-96-G-0673-S

MICHETTI PIPE STRINGING, INC.,
a corporation,
Plaintiff,

vs.

MURPHY BROTHERS, INC.,
a corporation,
Defendant.

MOTION TO REMAND

Plaintiff Michetti Pipe Stringing, Inc. ("Michetti") hereby moves this Court to remand this action to the Circuit Court of Jefferson County, Alabama wherein the action was originally filed. As grounds for remand, Michetti shows unto the Court that the Notice of Removal was not timely filed:

1. Michetti filed its complaint in the Circuit Court of Jefferson County on January 26, 1996.
2. Defendant Murphy Brothers, Inc. ("Murphy") received a copy of Michetti's complaint on January 29, 1996. On that date, counsel for Michetti conveyed a copy of the complaint via facsimile to Rick J. Moskowitz, Vice President-Risk Manager for Murphy. Representatives of Michetti, including Michetti's counsel, had communicated with Moskowitz on several occasions shortly before the filing of Michetti's complaint regarding the issues in dispute between the parties. A true and correct copy of the facsimile transmission of the complaint to Murphy is attached hereto a Exhibit A.

3. By letter dated January 30, 1996, Murphy acknowledged receipt of the complaint. A true and correct copy of this letter is attached hereto as Exhibit B. In this letter, Murphy states "the Fax transmission of your cover letter with Summons and Complaint in regard to the above matter was brought to my attention this morning." Murphy's letter, signed by Rick Moskowitz, shows a clear understanding that prompt action needed to be taken by Murphy to protect its rights, *including Murphy's right to remove*. The concluding paragraph of the letter states as follows:

However, I am sure when I report to Bill and Mike [Murphy] on this cause of action being filed that they will instruct me to retain counsel to file a Special Appearance, and any subsequent forum shopping will be similarly handled. Further, as the action, if any, will ultimately lie here (in Illinois), we will strenuously defend by raising both the payment in full and the Lien Waiver Releases as our defense and bar to the suit, whether in state court or removed to Federal District Court. (emphasis added).

4. The time period within which a state court defendant may remove a case to federal court is limited to 30 days from *receipt* of the complaint under 28 U.S.C. §1446(b), which provides in pertinent part:

The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based

5. Murphy did not file its notice of removal within 30 days after its receipt of the initial pleading setting forth Michetti's claim for relief. The 30-day period for filing the notice of removal began on January 29, 1996, when Murphy received a facsimile copy of the complaint which had been filed in state

court by Michetti. Murphy did not file its notice of removal until March 13, 1996, 44 days after the period for filing the notice of removal began to run. Therefore, the notice of removal is untimely, and this action must be remanded to the Circuit Court of Jefferson County, Alabama.

6. In *Pillin's Place, Inc. v. Bank One, Akron, N.A.*, 771 F. Supp. 205, 206 (N.D. Ohio 1991), the court held that the 30-day period for filing the notice of removal began to run when the manager of the defendant's collections department received a facsimile copy of the complaint which had been filed in state court. The court held that, even though the defendant filed its removal notice within 30 days of service of the summons and complaint, the action was due to be remanded because the removal was filed more than 30 days after the defendant received the facsimile copy of the complaint. *Id. Pillin's Place* is factually indistinguishable from the case at bar. For the Court's convenience, a copy of this decision is attached hereto as Exhibit C.

7. Some courts have held that the 30-day removal period does not begin running until the summons and complaint have been served. See, e.g., *Love v. State Farm Mutual Automobile Ins. Co.*, 542 F. Supp. 65, 68 (N.D. Ga. 1982); *Marion Corp. v. Lloyds Bank, PLC*, 738 F. Supp. 1377, 1379 (S.D. Ala. 1990). Such cases, espousing the so-called "Proper Service Rule" "ignore the clear and unambiguous language of the statute." *Pillin's Place*, 771 F. Supp. at 207. The applicable statute, 28 U.S.C. § 1446(b), clearly and unambiguously states that the notice shall be filed within 30 days "*after the receipt by the defendant, through service or otherwise*" of a copy of the complaint. If proper service were the only trigger for the 30-day removal period, then Congress would not have inserted the "or otherwise" language into § 1446(b). "Interpretation of a statute must begin with the statute's language." *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 300 (1989) (citations omitted). "The plain meaning of legislation should be

conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstratively at odds with the intention of its drafters.’” *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

8. Even if § 1446(b)’s directive that the 30-day removal period begins upon *receipt* of the complaint were somehow found to be ambiguous, any ambiguity must be resolved in favor of remand. As the United States Supreme Court explained in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941):

Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation “Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.”

Therefore, even if 28 U.S.C. § 1446(b) were found ambiguous, that ambiguity must be resolved against removing the defendant Murphy.

9. The majority of federal courts addressing this issue have rejected the Proper Service Rule in favor of the “Receipt Rule.” See *Klukesdahl v. Muro Pharmaceuticals Inc.*, 886 F. Supp. 535, 537 (E.D. Va. 1995). Under the Receipt Rule, the 30 day removal period begins running when the defendant, or its authorized agent, comes into possession of a copy of the complaint regardless of whether the delivery of the complaint complies with the requirements for formal service of process. *Id.*; see also *Valle Trade, Inc. v. Plastic Specialties & Technologies, Inc.*, 880 F. Supp. 499, 500 (S.D. Tex. 1995) (holding that receipt of courtesy

copy of complaint triggered the 30-day removal period); *Alliance Financial Services v. Villa Del Rey-Roswell, Ltd.*, 879 F. Supp. 1140, 1141 (D. Utah 1995) (holding that actual notice through receipt of complaint, not formal perfection of service, triggers 30-day removal period); *Rothwell v. Durbin*, 872 F. Supp. 880, 881 (D. Kan. 1994) (holding that removal was untimely because three months had elapsed since defendant received a courtesy copy of the complaint, even though the notice of removal was filed within 30 days from formal service); *Shoemaker v. GAF Corp.*, 814 F. Supp. 495, 498 (W.D. Va. 1993) (holding that pre-service receipt of complaint triggers 30-day removal period); *City of New Orleans v. Illinois Central Rail Co.*, 804 F. Supp. 873, 875-76 (E.D. La. 1992) (holding that removal more than 30 days after receipt of courtesy copy of complaint by the vice president and general counsel of the defendant was untimely, even though the notice of removal was filed within 30 days from formal service); *Greensmith Co. v Com Systems, Inc.*, 796 F. Supp. 812, 814 (D. N.J. 1992) (holding that receipt of copy of complaint by CEO triggers 30-day removal period, not formal service of process); *Lindley v. DePriest*, 755 F. Supp. 1020, 1026 (S.D. Fla. 1991) (holding that “any receipt” of complaint by defendant triggers 30-day removal period, regardless of actual date of formal service); *Silverwood Estates Development Limited Partnership v. Adcock*, 793 F. Supp. 226, 228 (N.D. Cal. 1991) (holding that defendant’s receipt of draft complaint giving notice that action was removable triggered 30-day removal period); *Uhles v. F.W. Woolworth Co.*, 715 F. Supp. 297, 298 (C.D. Cal. 1989) (holding that receipt of the complaint by the defendant’s attorney triggered the 30-day removal period, even though service of process was not perfected until later, and action was removed within 30 days of formal service); *Harding v. Allied Products Corp.*, 703 F. Supp. 51, 52 (W.D. Tenn. 1989) (holding that receipt of complaint by corporate counsel triggers 30-day removal period, even though such receipt did not constitute proper service of process).

10. The Eleventh Circuit has not addressed the Proper Service Rule or the Receipt Rule. In fact, only two appellate courts, the Seventh and Six [sic] Circuit Courts of Appeals, have addressed the conflicting rules. Both courts adopted the Receipt Rule. *See Roe v. O'Donohue*, 38 F.3d 298, 304 (7th Cir. 1994) ("the 30 days commences when the defendant, or its authorized agent, comes into possession of a copy of the complaint whether or not the delivery complies with the requirements of 'service'"); *Tech Hills II Associates v. Phoenix Home Life Mutual Ins. Co.*, 5 F.3d 963, 968 (6th Cir. 1993) (the 30 days commences "when the defendant has in fact received a copy of the initial pleading that sets forth the removable claim"). Both courts of appeals concluded that the Proper Service Rule cannot be reconciled with the plain wording of the statute. In *Roe*, for example, the Seventh Circuit stated "like the judges who decided *Tech Hills*, we see no escape from the language of the statute." 38 F.3d at 303.

11. Based on the plain wording of § 1446(b) and the foregoing authority, Murphy's notice of removal—filed 44 days after Murphy's receipt of a facsimile copy of the complaint—was not timely filed. Therefore, this action is due to be remanded to the Circuit Court for Jefferson County.

WHEREFORE, premises considered, Michetti Pipe Stringing, Inc. respectfully asks the Court to enter an order remanding this action to the Circuit Court for Jefferson County, Alabama, and providing such further and additional relief that the Court deems just and proper.

Respectfully submitted,

/s/J. David Pugh

J. David Pugh

/s/James F. Archibald, III

James F. Archibald, III

Attorneys for Michetti Pipe Stringing, Inc.

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
P.O. Box 830709
Birmingham, Alabama 35283-0709
(205) 521-8000

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing on Thomas A. Carraway, Esquire and Susan S. Hayes, Esquire, Rives & Peterson, 1700 Financial Center, 505 North 20th Street, Birmingham, Alabama 35203 by delivering a copy of same to them on this 3rd day of April, 1996.

/s/James F. Archibald
OF COUNSEL

Send Confirmation Report

Name: BRADLEY, ARANT, ROSE ID: 252064

Page 1

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CONFIRMATION COPY

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| DATE: <u>Jan 30, 1998</u> | TIME: _____ |
| PLEASE DELIVER THE FOLLOWING PAGES TO: | |
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| CITY: <u>Bethel Woods, IL</u> | PHONE NO.: <u>(205) 752-2227</u> |
| THIS TRANSMITTAL BEING SENT BY: | |
| NAME: <u>J. Dean Peck, Esq.</u> | DIRECT DIAL: <u>(205) 531-8114</u> |
| MESSAGE: _____ | |
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| NAME: <u>Tom 4156</u> Operator | |

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(Note: The following portions of Exhibit A to Motion to Remand have been omitted in printing: Civil Cover Sheet, Summons, and Complaint. The Complaint appears in the joint appendix at page A-2.)

EXHIBIT

A

BEST AVAILABLE COPY

January 29, 1996

Mr. Rick J. Moskowitz
MURPHY BROS., INC.
3150 5th Avenue
East Moline, Illinois 61244

Re: Michetti Pipe Stringing Florida Gas Project

Dear Rick:

When we did not hear back from you last week after our conversation on Wednesday with any further developments in the dispute between Murphy Brothers and Michetti Pipe Stringing, we had no alternative but to file a complaint to preserve all of our rights. A copy of the complaint is enclosed.

Please understand that Michetti had no other choice but to take this step to preserve all of its rights and remedies. However, Michetti would like to continue to explore the possibilities of resolving this matter without continuing the litigation. Accordingly, we are providing a courtesy of the complaint to you, and we hope to hear from you soon to discuss ways of settling this matter.

Very truly yours,
/s/J. David Pugh
J. David Pugh

JDP/rle
Enclosure

cc: Mr. Benny Michetti (w/enc.)
Mr. James Stone (w/enc.)

Murphy Bros., Inc.



DATE: 1/ 30 /96

A.M./P.M.

FACSIMILE TO:

David Pugh, Esq.

Bradley, Arant Law Offices

FAX NO: 205 - 521 - 8715

FROM: Rick Moskowitz

RE: Michetti

NUMBER OF PAGES TWO [2] INCLUDING COVER SHEET

CONFIDENTIALITY NOTICE: This Cover and the documents accompanying this teletype transmission contain confidential information belonging to the sender which is legally privileged. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this telecopied information is strictly prohibited. Please immediately notify us by telephone to arrange for the return of the original documents to us.

MESSAGE:

Please find herewith one (1) page letter of this date.

Thank you.

Dank -
Please give me a call often for receive + never
other than phone change!

EXHIBIT

B

JAN-30-96 TUE 9:20

MURPHY-ROS INC

P. 02

Murphy Bros., Inc.



Via Facsimile ONLY

January 30, 1996

Mr. J. David Pugh, Esq.
Bradley, Avant Law Offices
2001 Park Place
Birmingham, AL 35203

RE: Michetti Pipe Stringing, Inc.

Dear David:

The Fax transmission of your cover letter with Summons and Complaint in regard to the above matter was brought to my attention this morning.

Replies specifically to your letter, my notes of last Wednesday reflect that I would contact you after speaking with Mike Murphy, and similarly, that you would contact me after reporting to Bennie Michetti. Meanwhile, we were anticipating that someone from your client's organization would surely have contacted Lucien for his input, and so advise us.

I did speak with Mike late Friday and I was very busy yesterday, though I note the suit was filed on Friday. I do not believe the information that I was to provide to you would have averted your present action in any event, particularly since the suit was filed so soon and your clients raised nothing 'new' which would have suggested the need for further direct involvement of Bill or Mike.

However, I am sure when I report to Bill and Mike on this cause of action being filed that they will instruct me to retain counsel to file a Special Appearance, and any subsequent forum shopping will be similarly handled. Further, as the action, if any, will ultimately lie here, we will strenuously defend by raising both the payment in full and the Lien Waiver Releases as our defenses and bar to the suit, whether in state court or removed to Federal District court. And, in Illinois, the remedy of sanctions is available to us for pleadings which are filed and found not to be in good faith when signed by either or both counsel and party litigant.

Very truly yours,

Rick J. Moskowitz
Vice President - Risk Manager

RJM:nd

(Note: Exhibit C to Motion to Remand, which is a copy of *Pillin's Place, Inc., v. Bank One, Akron, N.A.*, 771 F. Supp. 205 (N.D. Ohio 1991), has been omitted in printing.)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. 96-G-0673-S

MICHETTI PIPE STRINGING, INC.,
a corporation,
Plaintiff,

v.

MURPHY BROTHERS, INC.,
a corporation,
Defendant.

[ENTERED: April 19, 1996]

ORDER

This cause came before the court at its regularly scheduled motion docket of this date on the motion of plaintiff to remand the case to the Tenth Judicial Circuit of Alabama. Having considered the motion, the pleadings, the submissions of counsel, and the applicable law, the court is of the opinion that the motion should be denied, the removal having been timely filed consistent with the meaning of 28 U.S.C.A. §1446(b). Accordingly, consistent with the memorandum opinion being entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that the motion of plaintiff to remand the case to the Tenth Judicial Circuit of Alabama be and it hereby is DENIED.

DONE and ORDERED this 19th day of April 1996.

/s/J. Foy Guin, Jr.
United States District Judge
J. Foy Guin, Jr.

APPENDIX F
IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. 96-G-0673-S

MICHETTI PIPE STRINGING, INC.,
a corporation,
Plaintiff.

MURPHY BROTHERS, INC.,
a corporation,
Defendant.

[ENTERED: April 19, 1996]

MEMORANDUM OPINION

The parties in the above-styled action agree on the facts. Suit was filed in the Tenth Judicial Circuit of Alabama on January 26, 1996. Defendant Murphy Brothers, Inc. [hereinafter Murphy] received a copy of the complaint on January 29, 1996, by facsimile. By letter of January 30, 1996, Murphy acknowledged receipt of the complaint, but Murphy did not file its notice of removal until March 13, 1996 (44 days after the period for filing the notice of removal began to run). The complaint was served on the defendant by certified mail on February 12, 1996.

At issue is whether the removal language of 28 U.S.C.A §1446(b), which follows, is to be interrupted [sic] as beginning to run when receipt of the complaint was known (January 29, 1996) or when the summons and complaint were served (February 12, 1996):

The notice of removal of a civil action or proceeding shall be filed within 30 days after **the receipt** by the defendant, through service **or otherwise**, of a copy of the initial

pleading setting forth the claim for relief upon which such action or proceeding is based . . . (emphasis added).

Plaintiff has argued that the time for removal runs from knowledge of the proceedings, not the service of process. Were it not so Congress would not have inserted the words "after the receipt by the defendant, through service or otherwise." The Eleventh Circuit has not addressed the question of whether the language of the statute should be interrupted [sic] as the "Proper Service Rule" or the "Receipt Rule." The Sixth and Seventh Circuit Courts of Appeal have adopted the "Receipt Rule." *Roe v. O'Donohue*, 38 F.3d 298, 304 (7th Cir. 1994) ("[T]he 30 days commences when the defendant, or its authorized agent, comes into possession of a copy of the complaint whether or not the delivery complies with the requirements of 'service.'"); *Tech Hills II Associates v. Phoenix Home Life Mutual Ins. Co.*, 5 F.3d 963, 968 (6th Cir. 1993) ('The removal period is commenced when the defendant has in fact received a copy of the initial pleading that sets forth the removable claim.'). Both courts of appeal concluded that the "Proper Service Rule" cannot be reconciled with the wording of the statute.

In *The City National Bank of Sylacauga v. Group Data Services*, 908 F. Supp. 896 (N.D. Ala. 1995), Judge Hancock applied the "Service Rule," as did Judge Howard in *Marion Corp. v. Lloyds Bank, PLC*, 738 F. Supp. 1377 (S.D. Ala. 1990). In denying the motion to remand Judge Hancock referred to *Marion and Love v. State Farm Mutual Automobile Insurance Company*, 542 F. Supp. 65 (N.D. Ga. 1982). Judge Hancock noted that a study of the congressional history surrounding 28 U.S.C. § 1446 indicates that the language relied on by the plaintiffs (28 U.S.C. §1446(b)) was added to the statute in 1949 to correct a problem created by the 1948 revision of the statute.¹

¹ In 1949 Congress did not anticipate use of facsmile transmissions.

In discussing the applicability of the statute in Alabama, Judge Hancock said the following:

The 1949 addition supplied the words "or otherwise" so as to provide for removal in states where an action is commenced merely by the service of a summons and there is no requirement that the initial pleading setting forth the claim for relief be served or filed until later. The language relied upon by plaintiff in § 1446(b) has no field of operation in states, such as Alabama, where the action is commenced by the filing of the complaint (Ala. R. Civ. P. 3) but a copy of that complaint must be served long with the summons (Ala. R. Civ. P. 4) (footnotes deleted).

This court agrees. Additionally, there could be problems in service upon a foreign state or political subdivision, agency, or instrumentality pursuant to 28 U.S.C. § 1608(a) which requires delivery of a copy of the summons and complaint in accordance with any special arrangements or an applicable international convention. In many instances service upon a foreign corporation takes much longer than 30 days. If the court were to adopt the "Receipt Rule," plaintiffs would be able to dodge the requirements of international treaties and trap foreign opponents into keeping their suits in state courts.

For the above-stated reasons the court holds that the motion to remand be denied.

An order consistent with this opinion is being entered contemporaneously herewith.

DONE and ORDERED this 19th day of April 1996.

/s/J. Foy Guin, Jr.
United States District Judge
J. Foy Guin, Jr.

APPENDIX G

UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

No. 96-7150

MICHETTI PIPE STRINGING, INC.
a corporation
Plaintiff-Appellant,

v.

MURPHY BROTHERS, INC.,
a corporation
Defendant-Appellee

Oct. 24, 1997

Appeal from the United States District Court
for the Northern District of Alabama
(No. 96-CV-673-JFG), J. Foy Guin, Jr., Judge

Before COX and BARKETT, Circuit Judges, and HUNT[*],
District Judge.
COX, Circuit Judge:

This interlocutory appeal presents a single issue: whether the thirty-day removal period provided by 28 U.S.C. § 1446(b) begins when the defendant receives a copy of the plaintiff's initial pleading, or when the defendant is served with a copy of that pleading. Concluding that the clock starts to tick upon the defendant's receipt of a copy of the filed initial pleading, we reverse.

Background

Michetti Pipe Stringing, Inc. sued Murphy Bros., Inc. in Alabama state court. Within a few days of filing suit, Michetti's

* Honorable Willis B. Hunt, Jr., U.S. District Judge for the Northern District of Georgia, sitting by designation.

counsel faxed a file-stamped copy of the complaint with a cover letter to Murphy's vice president for risk management. Murphy replied to the letter and acknowledged receipt of the complaint. Two weeks later, Michetti formally served Murphy by certified mail.

Murphy filed a notice of removal under 28 U.S.C. §1446(a) thirty days after the complaint had been served—but forty-four days after receiving the facsimile copy. Michetti moved the district court to remand the case to state court on the ground that the notice of removal was untimely. Citing district court precedent from Alabama and elsewhere in this circuit, the court denied the motion, but certified the order for interlocutory appeal, identifying the key question to be whether 28 U.S.C. §1446(b) embodies a “receipt rule” or a “service of process rule.”

This court granted Michetti’s petition for permission to appeal under 28 U.S.C. § 1292(b). Michetti now invites us to follow the statute’s plain language and hold that § 1446(b)’s thirty-day period runs from the defendant’s receipt of the complaint. Murphy, on the other hand, points to both legislative history and fairness concerns in asking for a rule that the thirty-day clock starts to tick upon service. Murphy proposes that service for this purpose need not mean service that complies with state procedures, as long as the plaintiff intended it as service.¹ Because the question here is purely one of law, we review *de novo* the district court’s denial of the motion to remand.²

Discussion

Section 1446, which governs the procedure for removal of a case from state to federal court, limits the period in which a defendant may exercise his removal right:

¹ (Appellee’s Br. at 6.)

² See *Lasche v. George W. Lasche Basic Profit Sharing Plan*, 111 F.3d 863, 865 (11th Cir. 1997).

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based³

By and large, our analysis begins and ends with the three italicized words. The statute uses the word “receipt,” not “service,” to describe the action that starts the thirty-day clock. “Receipt” is the nominal form of “receive,” which means broadly “to come into possession of” or to “acquire.”⁴ Attached to “receipt,” the phrase “through service or otherwise” opens a universe of means besides service for putting the defendant in possession of the complaint. Limiting the triggering event to “service,” on the other hand, would violate these words’ broad meaning by trimming that universe down to a narrow spectrum of methods.

If a statute is clear, it means what it says.⁵ We therefore join the other circuit courts that have confronted the issue and hold that the thirty-day removal period begins to run when a defendant actually receives a copy of a filed initial pleading by any means.⁶ Here, the countdown began the day after the arrival of the faxed, file-stamped copy of the complaint in the hands of a responsible Murphy employee. The notice of removal came forty-four days later and was therefore untimely.

³ 28 U.S.C. § 1446(b) (1994) (emphasis added).

⁴ Webster’s Third New International Dictionary 1894 (1986).

⁵ See *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989).

⁶ See *Reece v. Wal-Mart Stores, Inc.*, 98 F.3d 839, 841 (5th Cir. 1996); *Roe v. O’Donohue*, 38 F.3d 298, 303 (7th Cir. 1994); *Tech Hills II Assocs. v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963, 968 (6th Cir. 1993).

The statute's clarity notwithstanding, two of Murphy's contentions merit further discussion. First, Murphy argues that this plain meaning contravenes the congressional intent reflected in the legislative history. It is true that “[i]n rare and exceptional circumstances, we may decline to follow the plain meaning of a statute because overwhelming extrinsic evidence demonstrates a legislative intent contrary to the text's plain meaning.”⁷ But the phrase “receipt . . . or otherwise,” as interpreted here, is not contrary to—or “demonstrably at odds” with, as the Supreme Court has put it⁸—the intent Murphy divines from the legislative history.

That history is as follows: before 1948, a defendant could remove a case at any time when, under state procedure, he could file a responsive pleading.⁹ To homogenize practice from state to state, in 1948 Congress amended § 1446 to add a twenty-day (later thirty) deadline that ran from service of process.¹⁰ A problem arose, however, in states such as New York where service of process could precede filing and service of the complaint. In these states, a defendant's removal time could expire before he saw the complaint and knew whether it contained a removable claim.¹¹ In 1949, Congress amended § 1446 to the present “by receipt . . . or otherwise” language in order to

⁷ Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., 51 F.3d 235, 238 (11th Cir. 1995) (citing Hallstrom v. Tillarnook Co., 493 U.S. 20, 28-30, 110 S.Ct. 304, 310, 107 L.Ed.2d 237 (1989)); see Demarest v. Manspeaker, 498 U.S. 184, 190, 111, S.Ct. 599, 604, 112 L.Ed.2d 608 (1991).

⁸ Demarest, 498 U.S. at 190, 111 S.Ct. at 604 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982).)

⁹ Tech Hills II, 5 F.3d at 967.

¹⁰ Act of June 25, 1948, ch. 646, § 1446(b), 62 Stat. 869, 939 (1948).

¹¹ Robert F. Faulkner, The Courtesy Copy Trap, 52 Md. L.Rev. 374, 39394 (1993).

eliminate this problem.¹² From this history, Murphy argues that the “receipt . . . or otherwise” language was not meant to have any effect outside of states like New York. Therefore, Murphy concludes, only in New York did receipt replace service as the triggering event.

The legislative history does not lead to that result. There were undoubtedly narrower ways of solving the New York problem than changing the triggering event from service to receipt. That does not mean, however, that the result in this case is necessarily “at odds” with what Congress meant to do. An at odds reading “thwart[s] the obvious purpose of the statute.”¹³ An interpretation that started the clock running before the complaint landed in the defendant's hands could “thwart the obvious purpose” of the New York amendment, but today's reading does not do that. Rather, it puts defendants in other states on the same footing as those in New York: they have thirty days to remove after they see the filed complaint. It does not thwart Congress's intent to apply the amendment nationwide unless Congress indicated an intent to limit it to New York and like states. The indication is in fact to the contrary: the Senate report accompanying the amendment states that “[i]t is believed that this will meet the varying conditions of practice in all the States.”¹⁴ And the stated intent for the 1948 amendments was to make practice identical from state to state;¹⁵ making other states different from New York thwarts that intention. So the plain meaning stands.

¹² Act of May 24, 1949, ch. 139, § 83(a), 63 Stat. 88, 101 (1949); see H.R. Rep. No. 81-352 (1949), reprinted in 1949 U.S.C.C.A.N. 1254, 1268.

¹³ Commissioner v. Brown, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965).

¹⁴ S. Rep. No. 81-303 (1949), reprinted in 1949 U.S.C.C.A.N. 1248, 1254 (emphasis added).

¹⁵ See H.R. Rep. No. 80-308 (1948), reprinted in 1948 U.S.C.C.A.N. spec. pamphlet at A135-36.

Murphy's second contention is that a receipt rule invites abuse by perfidious plaintiff's counsel, who will, Murphy claims, set "courtesy copy traps" for unwary defendants—in extreme cases eliminating the right to remove by sending unfiled draft complaints thirty days before filing them. The short answer is that no such abuse has occurred here; Michetti faxed a file-stamped copy of the complaint to a Murphy employee who knew enough to see that a response followed. Any unfairness to Murphy here results more from unsettled law, which prevented Murphy from being able to determine its removal deadline, than Michetti's cunning.

The question of discouraging unjust tactics can thus be safely set "aside for consideration on a rainy day."¹⁶ In any event, it appears unlikely that a plaintiff could eliminate the right to remove altogether by sending a draft complaint thirty days before filing it—until it is filed, a draft complaint is not the "initial pleading setting forth the claim for relief upon which such action . . . is based" that the defendant must receive to start the thirty-day clock.¹⁷

Conclusion

The district court's denial of the motion to remand is reversed and the action is remanded with instruction to the district court to remand the action to the Tenth Judicial Circuit of Alabama.

REVERSED and REMANDED WITH INSTRUCTION.

¹⁶ Roe v. O'Donohue, 38 F.3d 298, 304 (7th Cir. 1994).

¹⁷ 28 U.S.C. § 1446(b).